# Mayban Securities Sdn Bhd v Perumal a/l Murugesu

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D4–22–296 OF 1998
ABDUL WAHAB PATAIL J
31 OCTOBER 2007

*Evidence — Adverse inference — Failure to call material witness — Provision for signing of forms to be witnessed — Whether fatal not to call witnesses — Evidence Act 1950 s 114(g)*

*Securities — Shares — Failure of client to make payment for shares — Trading exceeded limits agreed between plaintiff and defendant — Whether plaintiff performed its obligations pursuant to contract and whether defendant in breach of contract*

The plaintiff was a licensed stock broking company registered with KLSE with whom, according to the plaintiff, the defendant maintained a trading account. The defendant had failed to settle the outstanding sums within the time stipulated, resulting in contra losses. The plaintiff filed an action to recover the said losses from the defendant for the amount of RM2,312,943.46. After completion of trial, the issues inter alia for submissions were: (a) whether the failure to call material witnesses who were remisiers who were present when the plaintiff signed the form raised an adverse presumption under s 114(g) of the Evidence Act 1950; (b) whether the plaintiff's statement of claim disclosed any reasonable cause of action against the defendant; (c) whether the plaintiff performed its obligations pursuant to the contract and was the defendant in breach of the contract with the plaintiff and if so, was the plaintiff entitled to claim the losses as per the statement of claim.

**Held**:

(1) Since there was no legal requirement for effectiveness that the forms be signed in front of any person, the provision that the signing of the forms to be witnessed was merely to provide for evidential purposes, which in the light of the admission that he signed the documents, was irrelevant. It must be observed that in litigation before the courts, the objective of a fair and just decision requires that parties had a duty to

ensure that the courts had the facts right and those facts were recorded right. That part of the process of litigation was not adversarial. Only the submissions to persuade the court with a party's interpretation and understanding of what the facts mean, and the application of law to the facts as understood was adversarial. Hence, where the fact that the defendant signed the documents were admitted, then in the absence of statutory or regulatory provision requiring signature in front of witnesses, the fact the documents were not filled out by the defendant and not signed in front of witnesses was irrelevant (see para 4).

(2) Apart from disputing the address, the defendant had not disputed facts stated in the analysis of pleadings, in particular the existence of an agreement in writing with plaintiff as well as the material facts at paras 7 and 8 where the plaintiff had pleaded that the claim against the defendant was for the sum of RM2,312,943.46 as at 15 January 1998 for the contra losses as a result of the shares purchased and sold at the defendant's instructions, and that despite the plaintiff's demand for the said payment vide their solicitor's letter dated 24 December 1997, the defendant had failed and/or refused to pay the plaintiff the sum demanded or any sum thereof. The foundation, which was a complete cause of action, had been pleaded (see paras 6 & 8).

(3) From the records, it was apparent trading had exceeded the limits agreed between the plaintiff and the defendant. Now, if it was borne in mind that it was the defendant who by his application sought the trading facilities, it was the defendant who sought to trade, and it was the plaintiff who agreed to allow it subject to a trading limit. It was no different from a credit limit. The plaintiff might allow that limit to be increased at any time. If the defendant did not want it or did not need it, it could remain unutilised. Whether the defendant applied for it was irrelevant (see para 16).

**[Bahasa Malaysia summary**

Plaintif adalah syarikat broker saham berlesen yang berdaftar dengan Bursa Saham Kuala Lumpur di mana, mengikut plaintif, defendan mempunyai satu akaun perdagangan. Defendan telah gagal menyelesaikan jumlah yang perlu dibayar dalam masa yang dinyatakan, menyebabkan kerugian kontra. Plaintif memfailkan satu tindakan untuk menuntut kembali kehilangan-kehilangan tersebut daripada defendan berjumlah RM2,312,943.46. Selepas penghabisan perbicaraan, isu-isu di antara yang lain untuk penghujahan adalah: (a) Sama ada kegagalan memanggil saksi-saksi material yang merupakan remisier-remisier yang hadir ketika plaintif menandatangani borang mewujudkan satu andaian yang bertentangan di bawah s 114(g) Akta Keterangan 1950?; (b) sama ada pernyataan tuntutan plaintif mengemukakan

sebarang kausa tindakan yang munasabah terhadap defendan; (c) sama ada plaintif melaksanakan kewajipannya di bawah kontrak tersebut dan sama ada defendan memungkiri kontrak tersebut dengan plaintif dan sekiranya ada, adakah plaintif berhak untuk menuntut kehilangan-kehilangan seperti di dalam pernyataan tuntutan.

**Diputuskan**:

(1) Oleh kerana tiada keperluan undang-undang untuk keberkesanan bahawa borang-borang ditandatangani di hadapan seseorang, peruntukan bahawa borang harus disaksikan hanya adalah untuk tujuan pembuktian, di mana memandangkan pengakuan bahawa beliau menandatangani dokumen-dokumen tersebut, ia adalah tidak relevan. Ia harus diperhatikan bahawa dalam litigasi sebelum mahkamah, objektif satu keputusan adil dan saksama memerlukan pihak-pihak mempunyai satu kewajipan untuk memastikan bahawa mahkamah-mahkamah mendapatkan fakta-fakta yang betul dan fakta-fakta tersebut direkodkan secara betul. Bahagian proses litigasi tersebut bukanlah penentangan. Hanya hujahan-hujahan untuk meyakinkan mahkamah dengan pentafsiran dan kefahaman sesuatu pihak akan erti fakta-fakta, dan penggunaan undang-undang kepada fakta-fakta seperti yang difahami adalah penentangan. Dengan itu, apabila fakta bahawa defendan telah menandatangani dokumen-dokumen tersebut diakui, maka dengan ketakhadiran peruntukan berkanun atau peraturan yang memerlukan tandatangan di hadapan saksi-saksi, fakta bahawa dokumen-dokumen tersebut tidak diisikan oleh defendan dan tidak ditandatangani di hadapan saksi-saksi adalah tidak relevan (lihat perenggan 4).

(2) Selain daripada mempertikaikan alamat, defendan tidak mempertikaikan fakta-fakta yang dinyatakan dianalisa pliding-pliding, terutama sekali akan kewujudan satu perjanjian bertulis dengan plaintif dan juga fakta-fakta material di perenggan 7 dan 8 di mana plaintif telah memplidkan bahawa tuntutan terhadap defendan adalah untuk jumlah RM2,312,943.46 setakat 15 Januari 1998 untuk kehilangan kontra yang disebabkan oleh saham-saham yang dibeli dan dijual di atas arahan defendan, dan walaupun plaintif menuntut bayaran tersebut melalui surat peguamcara mereka bertarikh 24 Disember 1997, defendan telah gagal dan/atau enggan membayar plaintif jumlah yang dituntut atau sebarang jumlah. Asasnya, di mana terdapat satu kausa tindakan yang sempurna, telahpun diplidkan (lihat perenggan 6 & 8).

(3) Daripada rekod-rekod, ia adalah ketara bahawa perdagangan telah melebihi had-had yang dipersetujui di antara plaintif dan defendan. Jika ia diperhatikan bahawa defendan yang melalui permohonannya

memohon kemudahan perdagangan tersebut, ia adalah defendan yang memohon untuk berdagang, dan ia adalah plaintif yang bersetuju untuk membenarkannya tertakluk kepada had perdagangan. Ia adalah sama dengan satu had kredit. Plaintif mungkin membenarkan had tersebut dinaikkan pada sebarang masa. Sekiranya defendan tidak ingin atau tidak memerlukannya, ia kekal tidak digunakan. Sama ada defendan memohon untuknya adalah tidak relevan (lihat perenggan 16).]

**Notes**

For cases on failure to call material witness, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 161–171.

For cases on failure of client to make payment for shares, see 11 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 931–939.

**Legislation referred to**

Evidence Act 1950 ss 90, 91, 92, 114(g)

*Rajpal Singh Ghai (Affendi Zahari & Rakan-Rakan) for the plaintiff.*

*R Kengadharan (R Prabhakaran with him) (R Kengadharan & Co) for the defendant.*

**Abdul Wahab Patail J:**

**[1]** The plaintiff is a licensed stock broking company registered with KLSE with whom, according to the plaintiff, the defendant maintained a trading account. The defendant's application to trade in the sale and purchase of shares was accepted and confirmed by the plaintiff by way of a letter dated 21 October 1997. The transactions for the sale and purchase of shares in the defendant's account are evidenced by the issuance of the contract notes, contra statements, and account statements, all of which were sent to the defendant at his address as stipulated in the application form.

**[2]** The defendant failed in his undertaking to settle the outstanding sums within the time stipulated, resulting in contra losses. The plaintiff asserts that the defendant is in breach of his agreement with the plaintiff. The plaintiff filed this present proceeding to recover the said losses from the defendant for the amount of RM2,312,943.46 claimed vide the writ summons and amended statement of claim dated 9 February 1999, together with interest of RM48,363.67 until 15 January 1998, interest at 4.25% above base lending rate on RM2,312,943.46 from 16 January 1998 until full settlement; costs on solicitor client basis; and such other orders and reliefs as this court thinks fit.

**[3]** After completion of trial, the parties identified the following issues for submissions:

(a) Has the failure to call material witnesses by the plaintiff namely Ho Yee Fan (638), Leow Lee Fan (196), Baharil Izham Bin Hashim raised an adverse presumption under s 114(g) of the Evidence Act 1950?;

(b) The plaintiff's statement of claim disclosed no reasonable cause of action against the defendant therefore ought to be dismissed with costs;

(c) The testimony of Perumal a/l Murugesu ('DW1') and Chan Mon Hoi @ Yeo Mon Hoi ('DW2') was never challenged nor controverted in cross-examination;

(d) Is there a valid contract between the plaintiff and defendant and is the defendant bound by the terms and conditions of the said contract?;

(e) Is the plaintiff bound by the arrangement between the defendant and one KC Lim, Chan Mon Hoi @ Yeo Mon Hoi 'Ron Yeo' and the application of ss 91 and 92 of the Evidence Act 1950 in this regard?;

(f) Has the plaintiff performed their obligations pursuant to the contract between the plaintiff and the defendant and is the defendant in breach of the contract with the plaintiff and if so, is the plaintiff entitled to claim the losses as per the statement of claim?

*Has the failure to call material witnesses by the plaintiff namely Ho Yee Fan (638), Leow Lee Fan (196), Baharil Izham bin Hashim raised an adverse presumption under s 114(g) of the Evidence Act 1950?*

**[4]** The defendant admitted he signed the account opening form and other related documents. Whether he did so upon the instruction by one KC Lim is irrelevant in so far as the plaintiff is concerned. Similarly with regard to the entries in the forms. It is irrelevant that another filled in the form where he admitted signing the form. While admitting he had signed the forms, he denied he did so in the presence of Ho Yee Fan (638), or Leow Lee Fan (196) who are remisiers in the plaintiff company. Since there is no legal requirement for effectiveness that the forms be signed in front of any person, the provision that the signing of the forms to be witnessed is merely to provide for evidential purposes, which in the light of the admission that he signed the documents, is irrelevant. It must be observed that in litigation before the courts, the objective of a fair and just decision requires that parties have a duty to ensure that the courts have the facts right and those facts are recorded right. That part of the process of litigation is not adversarial. Only the submissions to persuade the court with a party's interpretation and understanding of what the facts mean, and the application of law to the facts as understood is adversarial. Hence, where the fact that the defendant signed

A the documents are admitted, then in the absence of statutory or regulatory provision requiring signature in front of witnesses, the fact the documents were not filled out by the defendant and not signed in front of witnesses is irrelevant.

B **[5]** In the event the failure to call Ho Yee Fan (638), or Leow Lee Fan (196) cannot justify exercising the discretionary power to draw an adverse presumption under s 114(g) of the Evidence Act 1950. For the reason dealt with below, the testimony of Baharil Izham bin Hassan is irrelevant.

C *The plaintiff's statement of claim disclosed no reasonable cause of action against the defendant therefore ought to be dismissed with costs*

**[6]** Apart from disputing the address Capital Review Sdn Bhd, No 107A
D Jalan SS21/17 Damansara Utama, 54740 Petaling Jaya Selangor Darul Eshan, the defendant had not disputed facts stated in the Analysis of Pleadings, in particular the existence of an agreement in writing with plaintiff as well as the material facts at paras 7 and 8 where the plaintiff had pleaded that the claim against the defendant is for the sum of RM2,312,943.46 as at
E 15 January 1998 for the contra losses as a result of the shares purchased and sold at the defendant's instructions, and that despite the plaintiff's demand for the said payment vide their solicitor's letter dated 24 December 1997, the defendant has failed and/or refused to pay the plaintiff the sum demanded or any sum thereof.

F **[7]** That the plaintiff never checked what is the true occupation of the defendant and that he had in fact an annual income of RM60,000 is no more than an argument that the defendant could lie about his occupation and income and then take advantage of it. The court finds this ground to be
G wholly without merit.

**[8]** The court finds that the foundation, which is a complete cause of action, has been pleaded. This issue must, therefore, be decided in the
H plaintiff's favour.

*The testimony of Perumal a/l Murugesu (DW1) and Chan Mon Hoi @ Yeo Mon Hoi (DW2) was never challenged nor controverted in cross-examination*

I **[9]** Taking into consideration that the defendant admitted he had not taken any action to complain to the relevant authorities, his allegation of unauthorized trading in his name cannot be accepted at full value. The plaintiff being a company, one would expect the defendant to complain to other persons, particularly those in authority, in the plaintiff's company.

In cross-examination, the defendant admitted that his agreement with KC Lim does not concern the plaintiff. In his answer to question 42 in his own witness statement, he suggested that Ron Yeo is the officer of the plaintiff. This person is in fact the second witness for the defendant. DW2 himself confirmed that DW1 was not forced or even pressured to sign the documents. He confirmed he had explained the consequences of signing the application form. His testimony-in-chief cannot be said to have been uncompromised in cross-examination. Nor can the testimony of the defendant be given, in the circumstances, full face value.

*Is there a valid contract between the plaintiff and defendant and is the defendant bound by the terms and conditions of the said contract*

**[10]** Not only did the defendant admit, but his admission is also corroborated by Chan Mon Hoi @ Yeo Mon Hoi (DW2) that the defendant signed the contract voluntarily. He also admitted signing the letter of authorisation which authorised the plaintiff and his remisier to conduct transactions on behalf of the defendant. There is, therefore, a valid contract between the plaintiff and the defendant and the plaintiff and the remisier at all times being the agents of the defendant, they are entitled to look to the defendant to honour his part of the bargain under the contract.

**[11]** The counsel for the defendant also submitted as follows:

The following facts was never challenged nor established in cross-examination:

(i) that DW1 issued and/or gave instructions to purchase and sell shares to Ho Yee Fan and/or to Leow Lee Fan;

(ii) that DW1 actually applied for an increase in trading limit;

(iii) that DW1 was drawing an annual income of RM60,000;

(iv) that DW1 was a Landscaping Manager;

(v) that DW1 was employed with Capital Review Sdn Bhd;

(vi) that DW1 actually received all contract notes, statement of accounts and correspondence from the plaintiff at the address reflected on the said documents;

(vii) that DW1 actually made the entries on the documents at pp 1, 4 and 5 of the common bundle of documents;

(viii) DW1 actually advanced the collateral sum of RM140,000 in favour of the plaintiff to obtain the additional trading limit of RM5m;

(ix) That DW1 has knowledge of the contract notes, correspondence and the statement of accounts purportedly issued by the plaintiff from time to time.

On the face of it, counsel appears to admit to these facts.

*Is the plaintiff bound by the arrangement between the defendant and one KC Lim, Chan Mon Hoi @ Yeo Mon Hoi 'Ron Yeo' and the application of ss 91 and 92 of the Evidence Act 1950 in this regard*

**[12]** The defendant had testified in his witness statement in QA 6 until 9, supported by Chan Mon Hoi @ Yeo Mon Hoi ('DW2') that the defendant executed the application on the instructions of one KC Lim. This issue was not pleaded. When raised in the testimony of the defendant and Chan Mon Hoi @ Yeo Mon Hoi ('DW2') only in the trial, the counsel for the plaintiff did not have the opportunity to verify it. The purpose of the requirement that it must be pleaded is to give the other an opportunity to verify and thus be able not only to confirm if it is true, but be able to explain it so that all parties and the court has a better understanding of that fact and what it means. It is an inherent part of the requirement of transparency to ensure that the court of justice is given all assistance not only to have the facts right, but also to be able to understand those facts and therefore safely draw the proper inferences and conclusions in order to deliver a fair and just decision. Any action that denies that transparency and opportunity to verify is fraught with suspicion and makes it unsafe to rely upon the evidence advanced under those circumstances. Such conduct must also be rejected by not taking into consideration any evidence tainted by it.

**[13]** In any event, the agreement involving the plaintiff is with the defendant and not KC Lim. That is the agreement relied upon in this case. Even if there were an agreement between the defendant and that KC Lim, for the latter to operate the defendant's account with the plaintiff, and to cover the losses incurred on that account, it is irrelevant to the plaintiff's case. There is no contractual privity between the plaintiff and KC Lim. If there were such an agreement, one would expect the defendant to seek his remedy by suing KC Lim to pay the plaintiff, but certainly the defendant cannot expect the plaintiff to bear the loss for the defendant's own folly.

**[14]** In the circumstances, there in no necessity to consider the application of ss 90 and 91 of the Evidence Act 1950 Act 56. There is no issue of parole evidence involved. It was also submitted for the defendant that ss 90 and 91 are irrelevant. Other matters raised for the defendant in submissions on this point are dealt with in the findings on the issue below.

*Has the plaintiff performed their obligations pursuant to the contract between the plaintiff and the defendant and is the defendant in breach of the contract with the plaintiff and if so is the plaintiff entitled to claim the losses as per the statement of claim.*

**[15]** The facts constituting a complete cause of action has been pleaded. The testimony of PW1, in particular his answers QA 7 until 37 were not successfully challenged or controverted by the defendant. The court concludes the issue and service of contract notes, contra statements and statements of account have been made in the ordinary course in compliance with the terms of the contract between the plaintiff and the defendant. The defendant is contractually deemed to have received the documents even if he had not actually received the same.

**[16]** From the records, it is apparent trading had exceeded the limits agreed between the plaintiff and the defendant. Now, if it is borne in mind that it is the defendant who by his application sought the trading facilities, it is the defendant who seeks to trade, and it is the plaintiff who agrees to allow it subject to a trading limit. It is no different from a credit limit. It follows the plaintiff may allow that limit to be increased at any time. If the defendant does not want it or does not need it, it can remain unutilised. Whether the defendant applied for it is irrelevant.

**[17]** In the circumstances of the findings above, it follows that judgment must be entered in favour of the plaintiff as claimed. Judgment is entered accordingly.

*Order accordingly.*

Reported by Sally Kee